

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST)
FOR REVIEW BY:)

KEVIN KRETT)

Petitioner.)

CHARGE NO.: 2009CF1485

EEOC NO.: 21BA90419

ALS NO.: 09-0705

ORDER

This matter coming before the Commission by a panel of three, Commissioners Sakhawat Hussain, M.D., Spencer Leak, Sr., and Rozanne Ronen presiding, upon Kevin Krett's ("Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Department of Human Rights ("Respondent")^[1] of Charge No. 2009CF1485; and the Commission having reviewed all pleadings filed in accordance with 56 Ill. Admin. Code, Ch. XI, Subpt. D, § 5300.400, and the Commission being fully advised upon the premises;

NOW, THEREFORE, it is hereby **ORDERED** that the Respondent's dismissal of the Petitioner's charge is **SUSTAINED** on the following grounds:

- A) Count A for **LACK OF JURISDICTION**; and
- B) Count B and Count C for **LACK OF SUBSTANTIAL EVIDENCE**.

In support of which determination the Commission states the following findings of fact and reasons:

1. On October 28, 2008, the Petitioner filed a charge of discrimination with the Respondent. The Petitioner alleged his former employer Jewel Food Stores, Inc. ("Employer") failed to reasonably accommodate his physical disability, post surgical Aphasia (Count A), and discharged him on May 2, 2008, because of his disability, post surgical Aphasia (Count B), and history of physical disability, brain tumor (Count C), in violation of Section 2-102(A) of the Illinois Human Rights Act ("Act"). On October 29, 2009, the Respondent dismissed Count A of the Petitioner's charge for Lack of Jurisdiction and Counts B and C for Lack of Substantial Evidence. On December 2, 2009, the Petitioner filed this timely Request.

^[1] In a Request for Review Proceeding, the Illinois Department of Human Rights is the "Respondent." The party to the underlying charge who is requesting review of the Department's action shall be referred to as the "Petitioner."

2. The Petitioner worked for the Employer as a Frozen Food Manager. In December 2007, after the Petitioner was diagnosed with a brain tumor, the Petitioner took time off from work for treatment of the tumor.
3. On March 23, 2008, the Petitioner submitted a doctor's note to the Employer. The note stated that the Petitioner was fit to return work without any restrictions. At that time, the Petitioner did not request from the Employer any accommodations for his medical condition.
4. On April 3, 2008, the Petitioner was involved in an altercation with a co-worker. The altercation began as a verbal dispute. The Petitioner contended the co-worker had ridiculed him because of his disability. The co-worker accused the Petitioner of ridiculing him because of his weight and calling him racial slurs. The verbal dispute escalated to a physical altercation, at which time the Petitioner threw a soda drink at the co-worker, striking his co-worker in the back. The altercation was witnessed by several employees including a manger.
5. The Employer conducted an investigation of the altercation. The Employer took statements from the Petitioner and the co-worker. The Petitioner admitted he had thrown the drink at his co-worker, and that he had also placed his co-worker in a headlock. The Employer also took statements from several employees who had witnessed the altercation.
6. As a result of its investigation, the Employer determined that the Petitioner had been the aggressor in the altercation and that he had violated the Employer's "Violence Free Workplace Policy" and its "Safety Relative to Robbery and Violence in the Workplace Policy." Based on its findings, the Employer discharged the Petitioner on May 2, 2008, and suspended the co-worker.
7. In his charge, the Petitioner alleged the Employer failed to accommodate him because the Employer did not take into consideration the impact his disability (post surgical Aphasia) had on his conduct on April 3, 2008. The Petitioner alleged that he was experiencing post-surgical Aphasia, which was related to his disability, which in turn affected his impulse control.
8. In his Request, the Petitioner argues that as to Count A, his charge was timely filed and therefore, the Respondent had jurisdiction over Count A. As to Count A, the Petitioner alleges he received notice of the Employer's decision to deny his request for an accommodation on May 2, 2008, the date of his discharge. Therefore, the Petitioner argues that as to Count A, the charge was timely filed 179 days after the Petitioner received notice of the alleged discriminatory conduct. As to Counts B and C, the Petitioner argues the Respondent's investigator made improper credibility determinations, and that a finder of fact must determine if the Employer's stated reason for terminating the Petitioner was a pretext for discrimination.

9. In its Response, the Respondent requests that the Commission sustain the dismissal of Count A of the Petitioner's charge for lack of jurisdiction because the Petitioner's condition fails to qualify as a disability within the meaning of the Act. As to Counts B and C, the Respondent requests that the Commission sustain the dismissal of these counts for lack of substantial evidence because there was no substantial evidence the Employer's articulated non-discriminatory reason for discharging the Petitioner was a pretext for disability discrimination.

Conclusion

The Commission concludes that the Respondent properly dismissed Count A of the Petitioner's charge for lack of jurisdiction. If the Petitioner's condition does not meet the definition of disability under the Act, there must be a finding of lack of jurisdiction. See 775 ILCS 5/1-103(I) (West 2010).

Further, the Commission concludes that the Respondent properly dismissed Counts B and C of the Petitioner's charge for lack of substantial evidence. If no substantial evidence of discrimination exists after the Respondent's investigation of a charge, the charge must be dismissed. See 775 ILCS 5/7A-102(D) (West 2010). Substantial evidence exists when the evidence is such that a reasonable mind would find the evidence sufficient to support a conclusion. See In re Request for Review of John L. Schroeder, IHRC, Charge No. 1993CA2747, 1995 WL 793258, *2 (March 7, 1995).

As to Count A, the Commission concludes that the Petitioner's condition, post-surgical Aphasia, does not qualify as a disability within the meaning of the Act.

Section 1-103(I)(1) of the Act defines "disability" as a "determinable physical or mental characteristic of a person..." which is "unrelated to a person's ability to perform the duties of a particular job..." 775 ILCS 5/1-103(I)(1) (West 2010). Furthermore:

[A] person's condition is related to his/her ability if it would make employment of the person in the particular position demonstrably hazardous to the health or safety of the person or others, or if it is manifested or results in behavior (e.g., absenteeism, poor quality or quantity of production or disruptiveness) that fails to meet acceptable standards.

56 Ill. Admin. Code § 2500.20(d)(2) (2010)

Section 2500.20(d)(1) clearly states that a condition does not qualify as a "disability" within the meaning of Act if that condition is demonstrably hazardous to the health and safety of others. By the Petitioner's own admission, his condition causes him to lack impulse control and on April 3, 2008, caused him to physically assault his co-worker. As such, his condition does not qualify as a disability

within the meaning of the Act because his condition is demonstrably hazardous to the health and safety of his co-workers.

Furthermore, assuming *arguendo* there was jurisdiction, Count A would still fail because the accommodation sought by the Petitioner—that the Employer take into consideration the Petitioner’s post-surgical Aphasia when meting out punishment—was not an accommodation request to assist the Petitioner to adequately perform his duties. Rather, the “accommodation” the Petitioner sought was for a lesser punishment for his admittedly violent conduct on April 3, 2008.

An employee seeking a reasonable accommodation under the Act... “bears the burden of asserting the duty to accommodate; showing that an accommodation was, in fact, requested; and demonstrating that accommodation was necessary for adequate performance.” Owens v. Department of Human Rights, 356 Ill.App.3d 46, 53 (1st Dist. 2005). In the Petitioner’s case, the nature of his accommodation request was for the Employer to mitigate the Petitioner’s discipline, which accommodation would not permit the Petitioner to adequately perform his job duties. Therefore, the Employer was under no duty to accommodate the Petitioner in this manner.

As to Counts B and C, the Commission finds no substantial evidence of disability discrimination. After an investigation into the April 3, 2008, incident, the Employer determined the Petitioner should be discharged because the Petitioner was the aggressor. The Petitioner does not dispute that he was physically aggressive on April 3rd and that he physically assaulted his co-worker at least twice—once when the Petitioner threw the soda at his co-worker, and again when the Petitioner put his co-worker in a headlock.

There is no substantial evidence that the Petitioner’s disability, rather than the Employer’s belief that the Petitioner was the physical aggressor in the April 3rd altercation, motivated the Employer to discharge the Petitioner on May 2, 2008. Without evidence of pretext, the Commission cannot substitute its judgment for the Employer’s business judgment. See Berry and State of Illinois, Department of Mental Health and Developmental Disabilities, IHRC, ALS No. S-9146 (December 10, 1997).

Accordingly, it is the Commission’s decision that the Petitioner has not presented any evidence to show the Respondent’s dismissal of his charge was not in accordance with the Act. The Petitioner’s Request is not persuasive.

THEREFORE, IT IS HEREBY ORDERED THAT:

The dismissal of Petitioner’s charge is hereby **SUSTAINED**.

This is a final Order. A final Order may be appealed to the Appellate Court by filing a petition for review, naming the Illinois Human Rights Commission, the Illinois Department of Human Rights, and

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Jewel Food Stores, Inc., as Respondents, with the Clerk of the Appellate Court within 35 days after the date of service of this Order.

STATE OF ILLINOIS

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Entered this 23rd day of June 2010

Commissioner Sakhawat Hussain, M.D.

Commissioner Spencer Leak, Sr.

Commissioner Rozanne Ronen